Supreme Court, U.S.
FILED
AUG 31 2015
OFFICE OF THE CLERK

No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
MATTHEW J. GINSBURG
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397

Peake DeLancey Printers, LLC - (301) 341-4800 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. A TENDER OF COMPLETE RELIEF CAN MOOT A PLAINTIFF'S CASE, BUT NEITHER CAMPBELL-EWALD'S RULE 68 OFFER OF JUDGMENT NOR ITS SETTLEMENT OFFER WAS A TENDER.	6
II. FOR MOOTNESS PURPOSES, AN UNACCEPTED RULE 68 OFFER OF JUDGMENT OR UNACCEPTED SETTLEMENT OFFER LEAVES THE PLAINTIFF IN THE SAME POSITION AS BEFORE THE OFFER WAS MADE.	13
III. A DEFENDANT WHO WISHES TO MOOT A PLAINTIFF'S CLAIM CAN EITHER UNCONDITIONALLY TENDER COMPLETE RELIEF OR CONSENT TO A DEFAULT JUDGMENT.	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:	Page
Arizona v. California, 530 U.S. 392 (2000) ..	17
Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 17 N.E.3d 1056 (Mass. 2014)	9
California v. San Pablo & Tulare R.R. Co., 149 U.S. 308 (1893).....	9, 11, 12, 13
Chathas v. Local 134 IBEW, 233 F.3d 508 (7th Cir. 2000)	17
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	13
Colby v. Reed, 99 U.S. 560 (1879).....	6, 9
Collins v. Kingsberry Homes Corp., 243 F. Supp. 741 (N.D. Ala. 1963)	7
Delta Air Lines v. August, 450 U.S. 346 (1981)	14, 15
Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948 (9th Cir. 2013)	3, 16
Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)	1
Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014)	2, 3, 16
Gomez v. Campbell-Ewald Co., 805 F. Supp. 2d 923 (C.D. Cal. 2011).....	2, 3
Knox v. Serv. Employees Int'l Union, 132 S. Ct. 2277 (2012)	13, 16

TABLE OF AUTHORITIES—Continued

	Page
McCauley v. Trans Union, LLC, 402 F.3d 340 (2d Cir. 2005)	17
Mondello v. Hanover Trust Co., 148 N.E. 136 (Mass. 1925)	7, 11
Peugh v. Davis, 113 U.S. 542 (1885)	7, 8, 9
Poteete v. Capital Engineering, Inc., 185 F.3d 804 (7th Cir. 1999)	8, 11
Riley-Stabler Constr. Co. v. Westinghouse Electric Corp., 396 F.2d 274 (5th Cir. 1968)	10
Rothe Development Corp. v. Department of Defense, 413 F.3d 1327 (Fed. Cir. 2005)	10
STATUTES AND RULES:	
Telephone Consumer Protection Act, 47 U.S.C. § 227	
47 U.S.C. § 227(b)(1)(B)	2
28 U.S.C. § 2041	9
FED. R. CIV. P.:	
Rule 12(b)(1)	2, 16
Rule 55(b)	18
Rule 67	9
Rule 68	*passim*
FED. R. EVID. 408	15

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS:

BLACK'S LAW DICTIONARY (6th ed. 1990)..... 6, 7

CORBIN ON CONTRACTS (Joseph M. Perillo ed., rev. ed. 2003) 8

RESTATEMENT (SECOND) OF JUDGMENTS (1982).. 17

SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (4th ed. 2003) 6, 8, 10

12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2991 (3d ed. 2014) 9

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] The AFL-CIO submits this brief to address the first question presented by this case: "Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim." Pet. Br. i. That is the same question that was presented, but not decided, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), which involved a Rule 68 offer of judgment made in the context of a suit for unpaid overtime under the Fair Labor Standards Act (FLSA). Although this case involves a federal statute regarding unsolicited telephone calls and text messages, rather than unpaid wages and overtime, the mootness question presented is the same. As we explained in our brief in *Genesis Healthcare*, the AFL-CIO has a strong interest in the correct understanding of Article III's case and controversy requirement as it bears on effective enforcement of basic workplace

---

[1] Counsel for the petitioner and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

rights because Rule 68 offers of judgment are commonplace in suits brought under the FLSA and other labor and employment laws.

STATEMENT

Campbell-Ewald Company, which is engaged in the business of providing marketing consulting services, entered into a contract with the U.S. Navy to develop and implement a multimedia recruitment campaign that included sending text messages to the cell phones of targeted individuals between the ages of 18 and 24 who consented to receive such messages. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 873 (9th Cir. 2014). Acting through a third-party vendor, Campbell-Ewald sent one such Navy recruitment text message to Jose Gomez. *Ibid.* Gomez, who was 40 years old at the time, was not within the targeted age range of the Navy's recruitment campaign and did not consent to receive text messages from the Navy. *Id.* at 874. Gomez filed this class-action lawsuit against Campbell-Ewald under a provision of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, which makes certain text messages unlawful absent "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B).

Campbell-Ewald extended a Rule 68 offer of judgment in the amount of $1,503 per violation plus costs to Gomez, as well as a traditional settlement offer for the same amount. *Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923, 926 (C.D. Cal. 2011). Gomez did not accept either offer and, by its express terms, the Rule 68 offer of judgment expired after fourteen days. *Gomez*, 768 F.3d at 874. Campbell-Ewald then moved to dismiss the case under Rule 12(b)(1), contending

that the Rule 68 offer of judgment and settlement offer for complete relief mooted Gomez's case. *Ibid.*

Focusing largely on the class action rather than Gomez's individual claim, the district court nevertheless held that neither the unaccepted Rule 68 offer nor the unaccepted settlement offer mooted Gomez's claim. *Gomez*, 805 F. Supp. 2d at 931. Campbell-Ewald appealed and the court of appeals reached the same conclusion, relying on recent circuit precedent to hold that "an unaccepted Rule 68 offer of judgment that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Gomez*, 768 F.3d at 875 (quoting *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)). Defendant then filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

A defendant's tender of complete relief to a plaintiff can moot a plaintiff's claim. A tender requires the defendant to actually provide money to the plaintiff or deposit money with the court in the plaintiff's name without condition or stipulation. A tender is thus an irrevocable transfer of title to funds from the defendant to the plaintiff made without regard to the outcome of the lawsuit and without requiring any reciprocal action by the plaintiff. If the amount of the tender is sufficient to satisfy any claim the plaintiff could make for relief, the plaintiff is left without any concrete interest in the litigation and the case is moot.

In contrast, a defendant's offer of complete relief – whether made pursuant to Rule 68 or as a traditional settlement offer – has no bearing on mootness if it is not accepted by the plaintiff. An unaccepted offer is

a nullity, leaving the plaintiff in the same position as before the offer was made. Nothing in Rule 68 changes this basic principle of contract law. To the contrary, Rule 68 states on its face that an offer of judgment that is not accepted within 14 days is considered withdrawn and that evidence of an unaccepted offer is inadmissible except for determining costs. The only effect of an unaccepted offer made pursuant to Rule 68, then, is to shift responsibility for post-offer costs from the defendant to the plaintiff if the plaintiff prevails in her claim but recovers less than the unaccepted offer.

Campbell-Ewald repeatedly claims in its brief that both its Rule 68 offer of judgment and its settlement offer constituted tenders, but it is clear from the facts presented that this is not correct. Campbell-Ewald never provided Gomez with the money it offered or deposited that money with the court in Gomez's name. And, Campbell-Ewald conditioned both of its offers upon Gomez's acceptance of the money offered in full satisfaction of his claim. Neither offer, therefore, met the basic elements of a tender.

Campbell-Ewald could have sought to moot Gomez's claim by actually tendering him the money it offered him or, in the alternative, by consenting to the district court entering a default judgment against the company. But because Campbell-Ewald did not take either of these steps, and because Gomez declined to accept both Campbell-Ewald's Rule 68 offer of judgment and settlement offer, this case is not moot.

ARGUMENT

As we explain in detail below, the answer to the first question presented by this case – "Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim[,]" Pet. Br. i – is "no." An "*offer* of complete relief," *ibid.* (emphasis added), made pursuant to Rule 68 of the Federal Rules of Civil Procedure or simply as part of a routine attempt to settle a case, does not moot a plaintiff's claim unless it is accepted. For Article III purposes, an unaccepted offer changes nothing with regard to the plaintiff's interest in the case; the same live controversy that existed before the offer was made persists after the offer is declined or withdrawn.

In contrast, a tender of complete relief – which involves the defendant's unconditional proffer of money to the plaintiff or deposit of that money with the court – *can* moot the plaintiff's case. Campbell-Ewald characterizes the Rule 68 offer of judgment and the settlement offer it made to Gomez as "tenders." But the facts of this case make clear that the company's offers did not involve "tenders" of the sort that can moot a claim because the offers did not include the proffer of money and were not unconditional. Campbell-Ewald's offers, therefore, were not tenders of complete relief and, consequently, Gomez's case is not moot.

I. A TENDER OF COMPLETE RELIEF CAN MOOT A PLAINTIFF'S CASE, BUT NEITHER CAMPBELL-EWALD'S RULE 68 OFFER OF JUDGMENT NOR ITS SETTLEMENT OFFER WAS A TENDER.

Campbell-Ewald repeatedly characterizes its Rule 68 offer of judgment and settlement offer as "tenders," rather than unaccepted offers, and argues that they mooted Gomez's claim. As we explain below, Campbell-Ewald is correct that a tender for complete relief, unlike an unaccepted Rule 68 offer or unaccepted settlement offer, could render a plaintiff's case moot. But Campbell-Ewald did not tender any relief to Gomez in this case. As a result, Campbell-Ewald's arguments regarding tender simply do not apply here.

A. A tender is "[t]he act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition." BLACK'S LAW DICTIONARY 1467 (6th ed. 1990). *See also* 28 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 72:27 (4th ed. 2003) ("'[T]ender' is an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation[.]"). "[T]he principle of the plea of tender is that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able by tendering the requisite money[.]" *Colby v. Reed*, 99 U.S. 560, 561 (1879). The two essential elements of a tender, therefore, are "[t]he actual proffer of money, as distinguished from [the] mere proposal or proposition to proffer it," and that

the proffer be unconditional, "without any stipulation or condition." BLACK'S LAW DICTIONARY 1467.

As to the first element, it is black-letter law that "[t]o constitute a valid tender the money must be actually produced and offered to the person who is entitled to receive it." *Mondello v. Hanover Trust Co.*, 148 N.E. 136, 137 (Mass. 1925). *See also ibid.* (collecting state supreme court cases holding same). "A mere offer to pay or a statement that the party has the money and is ready and willing to pay, without actual production of it, is not sufficient to constitute a valid tender." *Ibid.* "[P]roduction of [the] subject matter of [the] tender" is, therefore, an "essential characteristic[] of tender." BLACK'S LAW DICTIONARY 1467 (citing *Collins v. Kingsberry Homes Corp.*, 243 F. Supp. 741, 744 (N.D. Ala. 1963)).

In *Peugh v. Davis*, 113 U.S. 542 (1885), this Court confirmed the requirement that, to constitute a tender, a defendant must "actually produce[] and offer[]" the money owed "to the person who is entitled to receive it." *Mondello*, 148 N.E. at 137. *Peugh* involved a dispute in which Peugh, who had conveyed the use of certain lots of land to Davis in exchange for a loan, sought to have the interest on the loan set aside on the ground that Davis had refused an offer of repayment. In rejecting Peugh's request to set aside the interest, the Court explained,

> "The short answer to all this is, that Mr. Peugh owed the money he had borrowed from Davis. Nothing hindered during all this time that he should pay this money; and if, as he alleges, Davis denied his right to do so, then he should have made a regular and lawful tender of the amount due.

> "A lame attempt is made to show that he did make this tender. Some evidence is offered that he told Davis he was ready to account with him and pay what was due, and that he had the money with him.
>
> "But in order to make a tender that would have caused the interest to cease, he should have ascertained for himself the sum due, or have fixed upon a sum which was sufficient, and then made a formal tender by counting out or offering that sum to Davis distinctly and directly as a tender." *Peugh*, 113 U.S. at 544-45.

What is clear from *Peugh*, then, is that it is not a tender when a defendant "t[ells] [the plaintiff] he [i]s ready to account with him and pay what [i]s due, and that he ha[s] the money with him." *Ibid.* That is a mere offer. To constitute a tender, the defendant must "count[] out or offer[] that sum to [the plaintiff] distinctly and directly." *Ibid.*

The second element of a tender is that the "tender of money . . . must be unconditional." 13 CORBIN ON CONTRACTS § 67.7(6) (Joseph M. Perillo ed., rev. ed. 2003). For example, "a condition that a payment shall be taken in full discharge or as a compromise of the debtor's obligation . . . invalidates the tender." 28 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 72.39. To constitute a tender, the defendant must provide payment to the plaintiff unilaterally, without stipulations, conditions, or demands for reciprocal action from the plaintiff in exchange for the payment. At bottom, then, a tender involves "simply writing [the plaintiff] a check, with no strings attached." *Poteete v. Capital Engineering, Inc.*, 185 F.3d 804, 807 (7th Cir. 1999). Thus, where a defendant "condition[s] [its] offer to pay [the plaintiff] on his

surrendering his other claims," "[t]hat is . . . an offer of settlement," not a tender. *Ibid.*

A tender, properly made, may render the plaintiff's claim moot. However, because a tender is by definition unconditional, a "tender cause[s] the [plaintiff's] interest to cease" only when it is equivalent to the entire "amount due" to the plaintiff. *Peugh*, 113 U.S. at 544-45. In that regard, it is important to emphasize that, in the event the tender is "made after [the] action [is] brought," complete relief of the sort that would moot a plaintiff's claim "must include the costs to that time as well as the debt." *Colby*, 99 U.S. at 565. *Cf. California v. San Pablo and Tulare R.R. Co.*, 149 U.S. 308, 313 (1893) (defendant's payment of "the sums sued for in this case, together with interest, penalties and costs, extinguished" "[a]ny obligation of the defendant to pay the State"). So, for example, a tender that includes the amount of the plaintiff's claim but not the attorney's fees and costs to which the plaintiff is statutorily entitled if she prevails is insufficient to require dismissal of the plaintiff's suit. *Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group*, 17 N.E.3d 1056, 1064 (Mass. 2014).

Where a plaintiff refuses a tender despite the fact that it provides her with complete relief, the proper course is for the defendant to make "payment of the money into court," *Colby*, 99 U.S. at 565, as permitted by Rule 67 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2041. *See* 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2991 (3rd ed. 2014) (explaining that Rule 67 "is useful in cases of tender of an undisputed sum."). Such a deposit, after the plaintiff has refused the tender, has the same effect as the defendant's tender to

the plaintiff herself. *See, e.g., Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1331-32 (Fed. Cir. 2005) (to constitute "a valid tender" defendant must either "provid[e] [the plaintiff] with a check or deposit[] such a check with the court"); *Riley-Stabler Constr. Co. v. Westinghouse Electric Corp.*, 396 F.2d 274, 278 (5th Cir. 1968) (stating same). That is so because a "payment into court in support of a prior tender" "constitute[s] a final irrevocable transfer of title to the fund by the party making the tender, regardless of the outcome of the action and irrespective of any acceptance by the party to whom a tender is made." WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 72:44.

B. In this case, Campbell-Ewald refers throughout its brief to its Rule 68 offer of judgment and settlement offer as "tenders." *See, e.g.*, Pet. Br. 11 ("Campbell-Ewald made its tender of complete relief before any class was certified"); *id.* at 25 ("defendant had already tendered Plaintiff all the relief he could possibly secure through this action"). *See also* Pet. Br. 2, 6, 19, 20, 20 n. 5. That is simply not an accurate characterization. Neither offer meets the essential elements of a tender.

In both its Rule 68 offer of judgment and its settlement offer, Campbell-Ewald *offered* to pay Gomez $1,503 and costs. *Gomez v. Campbell-Ewald Co.*, 2:10-cv-02007 (C.D. Cal.), docket entry 31 (Rule 68 offer of judgement) & docket entry 49, exhibit 5 (settlement offer). But Campbell-Ewald never tendered any money to Gomez or deposited any money with the district court in Gomez's name. Indeed, as Campbell-Ewald acknowledges, "[t]he offers made explicit that Campbell-Ewald would '*arrange* for prompt payment[,]'" Pet. Br. 7 (quoting settlement offer, p. 2) (emphasis added), they

did not *include* payment. Neither offer, therefore, met the basic requirement of a tender that "the money be actually produced and offered to the person who is entitled to receive it." *Mondello*, 148 N.E. at 137.

Both of Campbell-Ewald's offers also conditioned payment upon Gomez's acceptance of the offered amount in full satisfaction of his claim and his agreement to terminate the lawsuit. The Rule 68 offer specified that "[t]his offer shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service," and made clear that it was "intended to fully satisfy the individual claims of Gomez asserted in this action or which could have been asserted in this action." *Gomez*, 2:10-cv-02007 at docket entry 31 ¶ 6-7. Similarly, the settlement offer explicitly conditioned "prompt payment" of the promised funds on Gomez's acceptance and stated that "[t]he offers extended in this letter are intended to fully satisfy the individual claims of Mr. Gomez or which could have been made in his suit." *Id.* at docket entry 49, exhibit 5, p. 2. Because they were conditional, both of Campbell-Ewald's offers constituted "offer[s] of settlement," *Poteete*, 185 F.3d at 807, rather than tenders.

In light of these facts, it is passing strange that, in its brief, Campbell-Ewald relies heavily on this Court's decision in *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893), as support for its claim that its unaccepted Rule 68 offer of judgment and unaccepted settlement offer mooted Gomez's claim. Campbell-Ewald correctly states that *San Pablo* stands for the proposition that "a defendant's tender of the relief sought eliminates an Article III controversy." Pet. Br. 16. But the facts of *San Pablo*, as de-

scribed by Campbell-Ewald in its brief, make clear that neither of Campbell-Ewald's offers to Gomez were tenders.

San Pablo involved a suit by the State of California against a railroad company to recover unpaid taxes. 149 U.S. at 308. As Campbell-Ewald correctly observes, "[w]hile the case was pending, 'the defendant offered *and tendered* to the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee, to recover which this action was brought, and costs of suit.'" Pet. Br. 17 (quoting *San Pablo*, 149 U.S. at 311-12) (emphasis added). After California rejected the railroad's tender, the railroad "deposit[ed] the money in a bank, which by a statute of the State ha[d] the same effect as actual payment and receipt of the money." *San Pablo*, 149 U.S. at 314.[2] Based on that deposit, which functioned as a tender by operation of state law, this Court held that "[a]ny obligation of the defendant to pay to the State the sums sued for in this case, together with interest, penalties and costs, has been extinguished." *Id.* at 313.

In strong contrast, in this case, Campbell-Ewald never "tendered to the plaintiff" any money at all, *id.* at 311, or deposited the money it admitted it owed to Gomez with the district court. Therefore, unlike in *San Pablo*, Campbell-Ewald did not tender Gomez

---

[2] Section 1500 of the Civil Code of California at the time stated: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State of good repute, and notice thereof is given to the creditor." *San Pablo*, 149 U.S. at 312.

complete relief and "[a]ny obligation of the defendant to pay to the [plaintiff] the sums sued for in this case," most certainly was *not* "extinguished," *id.* at 313, by either Campbell-Ewald's Rule 68 offer of judgment or settlement offer.

II. FOR MOOTNESS PURPOSES, AN UNACCEPTED RULE 68 OFFER OF JUDGMENT OR UNACCEPTED SETTLEMENT OFFER LEAVES THE PLAINTIFF IN THE SAME POSITION AS BEFORE THE OFFER WAS MADE.

"A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.' As long as the parties have a concrete interest, however, small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). Because an unaccepted Rule 68 offer leaves the plaintiff in the same position as before the offer was made – other than the possibility of costs being shifted to the plaintiff – an unaccepted Rule 68 offer has no effect on whether the plaintiff retains a "concrete interest in the outcome of the litigation." *Ibid.*

By its terms, the plain language of Rule 68 makes clear that an unaccepted offer of judgment does not permit the district court to enter judgment in the case, but rather such an offer expires by its own terms and, thereafter, is a nullity. The Rule permits a defendant to "offer to allow judgment on specified terms, with the costs then accrued." FED. R. CIV. P. 68(a). If the plaintiff "serves written notice accepting the offer"

within 14 days, "either party may then file the offer and notice of acceptance" with the court and "[t]he clerk must then enter judgment." *Ibid.* If the plaintiff declines to accept the offer – or if the plaintiff simply takes no action "within 14 days after being served" – the "unaccepted offer is considered withdrawn." FED. R. CIV. P. 68(a) & (b).

There is no ambiguity in the Rule. Nothing in Rule 68's text states or suggests that a district court may enter judgment based on an unaccepted offer. And, this Court has previously stated that, in interpreting Rule 68, the Court should "limit [its] analysis to the text of the Rule itself." *Delta Air Lines v. August*, 450 U.S. 346, 348, 352 (1981) (construing the words "judgment finally obtained by the offeree" in an earlier version of Rule 68 as "appl[ying] only to judgments obtained by the plaintiff," not to judgments obtained by a defendant who makes a Rule 68 offer). Indeed, the language of the Rule is so clear that Campbell-Ewald *does not even cite Rule 68 or discuss the Rule's text in its brief, see* Pet. Br. xiii (Table of Authorities); *id.* 13-22 (Argument), much less attempt to offer an alternative interpretation of the Rule's meaning.

The text of Rule 68 also makes clear that the sole effect of a plaintiff's decision to decline a Rule 68 offer of judgment is that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." FED. R. CIV. P. 68(d). As this Court has explained, "[i]f a plaintiff chooses to reject a reasonable [Rule 68] offer," "he [is] not [] allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces

an award that is less than or equal to the amount offered." *Delta Air Lines*, 450 U.S. at 356. But nothing in *Delta Air Lines* or this Court's other precedent suggests that a court can prohibit a plaintiff from rejecting a Rule 68 offer of judgment, even if it constitutes "a reasonable offer." *Ibid.*

This reading of the Rule 68's operative effect as limited to "'sav[ing]' a defendant from having to reimburse the plaintiff for costs incurred after the offer was made," *id.* at 360, is further confirmed by the Rule's provision stating that "[e]vidence of an unaccepted offer is not admissible," except for the limited purpose of "a proceeding to determine costs." FED. R. CIV. P. 68(b). This provision – which generally accords with the evidentiary rule that "offer[s] [of] valuable consideration to compromise [a] claim" are inadmissible with regard to a determination of the merits, FED. R. OF EVID. 408 – strongly suggests that the limited purpose of the Rule is "to *encourage* the settlement of litigation," *Delta Air Lines*, 450 U.S. at 352 & n.8 (citing Advisory Committee's Notes on FED. R. CIV. P. 68, 28 U.S.C. App., p. 499) (emphasis added), *not* to allow a defendant to forcibly moot a plaintiff's case. Thus, because "[e]vidence of an unaccepted offer is not admissible," FED. R. CIV. P. 68(b), a defendant may no more rely on an unaccepted Rule 68 offer of judgment as a basis to seek dismissal of a plaintiff's case than it could rely on an unaccepted settlement offer for that same purpose.

In this case, Campbell-Ewald relied on its unaccepted Rule 68 offer of judgment and unaccepted settlement offer as the ground for its motion to dismiss Gomez's suit for lack of jurisdiction. *Gomez*, 2:10-cv-

02007, docket entry 46 (Def's Memo. in Support of Motion to Dismiss for Lack of Jurisdiction). The court of appeals correctly rejected that argument on the basis that because "'[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot[,]'" *Gomez*, 768 F.3d at 875 (quoting *Diaz*, 732 F.3d at 950), this case still presents a live controversy.

III. A DEFENDANT WHO WISHES TO MOOT A PLAINTIFF'S CLAIM CAN EITHER UNCONDITIONALLY TENDER COMPLETE RELIEF OR CONSENT TO A DEFAULT JUDGMENT.

Although an unaccepted Rule 68 offer of judgment or unaccepted settlement offer is insufficient to moot a plaintiff's claim, a defendant who wishes to avoid the risks and expenses associated with continued litigation by making the plaintiff whole still has ample means to do so.

First, as we have already described, a defendant can moot a plaintiff's claim by making an unconditional tender of complete relief. *See supra* Section I. In this case, Campbell-Ewald could have sought to moot Gomez's claim by unconditionally tendering Gomez a check for $1,503 or by depositing a check for that amount with the district court. Whether or not Gomez accepted the tender, Campbell-Ewald could move under Federal Rule of Civil Procedure 12(b)(1) to dismiss Gomez's claim on the basis that Gomez no longer had any "concrete interest . in the outcome of the litigation," *Knox*, 132 S. Ct. at 2287, such that his claim was moot. The court would then have had to determine, as a factual matter, whether "[a]ny obligation of the defendant to pay to [the plaintiff] the

sums sued for , together with interest, penalties and costs, has been extinguished" such that "the cause of action has ceased to exist." *San Pablo*, 149 U.S. at 313.

Alternatively, as Campbell-Ewald acknowledges, "'[i]t is always open to a defendant to default and suffer judgment to be entered against him without his admitting anything – if he wants, without even appearing in the case.'" Pet. Br. 24 (quoting *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000)). Like a tender that fully satisfies the plaintiff's claims, where "the defendant has thrown in the towel there is nothing left for the district court to do except enter judgment." *Chathas*, 233 F.3d at 512. *Accord McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (stating that a default judgment "would remove any live controversy from th[e] case and render it moot"). Notably, a default judgment does not ordinarily have issue-preclusive effect in similar future cases against the defendant by other plaintiffs because the merits have not been "'actually litigated and determined.'" *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27, at 250 (1982)). *See also* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e, at 257 (explaining that, "[i]n the case of a judgment entered by default," issue preclusion does not apply absent an agreement to the contrary).

Campbell-Ewald suggests that "an offer of complete relief puts the plaintiff in a far better position than a default" because "[i]t grants him all the relief he seeks without having to worry about spending time and resources chasing after a defendant that has de-

faulted in order to secure any meaningful relief at all." Pet. Br. 24. Even assuming this is true – and there are countervailing considerations since when a default judgment is entered, unlike a Rule 68 offer, the extent of damages is determined at the plaintiff's initiative, *see* FED. R. CIV. P. 55(b) – Campbell-Ewald's suggestion has no bearing on Article III mootness. A default *judgment* is a final judgment on the merits that ends the case, whereas a Rule 68 *offer* remains just that – an offer that only has effect if it is accepted by the plaintiff within the time period and in the manner set forth in the Rule.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
MATTHEW J. GINSBURG
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397